

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1151

M.L.-S.F.

vs.

J.S.F.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Probate and Family Court judge denied M.L.-S.F.'s (wife) motion for relief from a divorce judgment pursuant to Mass. R. Dom. Rel. P. 60 (b) (3) and entered a judgment of contempt against her for failure to sell the marital home. On appeal, she contends that (1) the judge ignored evidence of fraud on the court when denying her motion; (2) the judge did not find sufficient facts to support the contempt judgment; and (3) she should be awarded appellate fees and costs. We affirm the order denying the motion for relief from judgment and the contempt judgment. The request for appellate fees and costs is denied.

Discussion. 1. Rule 60 motion. "A motion brought under rule 60 (b) is addressed to the discretion of the judge. . . . Such a decision 'will not be reversed on appeal save for

abuse.'" Bird v. Ross, 393 Mass. 789, 791 (1985), quoting Parrell v. Keenan, 389 Mass. 809, 815 (1983).

In her motion, the wife alleged that J.S.F. (husband) committed fraud on the court by obscuring his financial status at the time of the parties' separation. "A 'fraud on the court' occurs where 'it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.'" Paternity of Cheryl, 434 Mass. 23, 35 (2001), quoting Rockdale Mgte. Co. v. Shawmut Bank, N.A., 418 Mass. 596, 598 (1994). "Conduct such as nondisclosure to the adverse party or the court of facts pertinent to the matter before it, without more, does not constitute fraud on the court for purposes of setting aside a judgment under rule 60 (b)."
Sahin v. Sahin, 435 Mass. 396, 406 (2001).

Here, the wife alleged that (1) her son knew of funds in his name prior to trial, contrary to the judge's findings; (2) the husband had far greater assets at the time of separation than the judge found; and (3) the husband submitted his tax returns to the court late. Even if all of these allegations are true, they amount to no more than "nondisclosure to . . . the

court of facts pertinent to the matter before it," Sahin, 435 Mass. at 406, or an attempt to relitigate the divorce, which a panel of this court already affirmed. M.L.-S.F. v. J.S.F., 91 Mass. App. Ct. 1128 (2017). We discern no abuse of discretion.¹

2. Contempt. We are also not persuaded that the judge found insufficient facts to support the contempt judgment. "[A] civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command." In re Birchall, 454 Mass. 837, 853 (2009). The person in contempt must also have the ability to comply with the original order. See Larson v. Larson, 28 Mass. App. Ct. 338, 340 (1990) ("the defendant must be found to have the ability to pay at the time the contempt judgment enters"). We review a contempt judgment for abuse of discretion, L.F. v. L.J., 71 Mass. App. Ct. 813, 821 (2008), but accept all factual findings supporting the judgment absent clear error. Judge Rotenberg Educ. Ctr. v. Commissioner of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 452 (1997).

¹ We also note that the wife's motion was untimely. A motion under Mass. R. Dom. Rel. P. 60 (b) (3), based on alleged fraud, must be brought not later than one year after the judgment entered. The judgment of divorce nisi issued on December 30, 2015, entered on the docket of the Probate and Family Court on January 6, 2016, and the wife filed her rule 60 (b) motion on February 12, 2018, more than two years later.

Here, the judge found the following facts, which are not clearly erroneous: "1. On December 30, 2015, a Judgment of Divorce Nisi [issued] requiring the [wife] to sell [the marital home]. 2. The [wife] has not sold the property and testified that she cannot sell the property because it needs repairs and that she would have nowhere else to live. 3. On this date, [the wife's] Motion for Relief from Judgment was denied. . . . The property can certainly be sold as is and no improvements need be made to secure a sale." These findings are sufficient to show the wife's disobedience of an unequivocal command. The judge also implicitly rejected the wife's argument that she could not follow the order to sell the house. Cf. Giannasca v. Everett Aluminum, Inc., 13 Mass. App. Ct. 208, 214 (1982) (judge implicitly found violation of G. L. c. 93A, § 2, in awarding damages). We discern no abuse of discretion.

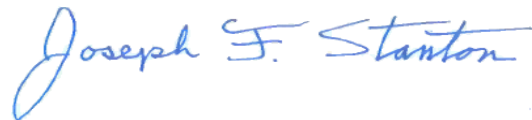
3. Appellate fees and costs. The wife requests appellate fees and costs in her brief, but offers no argument or authority in support of her request. In any event, we discern no basis for the request. The wife brought this appeal, does not prevail on it, and because the husband declined to submit a brief, she cannot claim that he has advanced any frivolous claim or argument.²

² "To the extent we have not addressed every aspect of the [wife's] arguments, we have concluded no discussion is

Conclusion. We affirm the order denying the wife's motion for relief from judgment pursuant to Mass. R. Dom. Rel. P. 60, and the judgment of contempt. The request for appellate fees and costs is denied.

So ordered.

By the Court (Green, C.J.,
Massing & Shin, JJ.³),



Clerk

Entered: June 24, 2019.

warranted." Williams v. B & K Med. Sys., Inc., 49 Mass. App. Ct. 563, 577 (2000).

³ The panelists are listed in order of seniority.